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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-344

No. COA21-443

Filed 17 May 2022

Transylvania County, No. 19 CVS 387

TRACEY CATHERINE BRIGGS, Plaintiff,

v.

SARA MARIE MARKIEWICZ, Defendant.

Appeal by plaintiff from order entered 9 April 2021 by Judge Peter B. Knight in Transylvania County Superior Court. Heard in the Court of Appeals 22 February 2022.

Whitfield-Cargile Law, PLLC, by Davis A. Whitfield-Cargile, and Dalton Law Office, PLLC, by Tony C. Dalton, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Austin R. Walsh, for defendant-appellee.

ZACHARY, Judge.

¶ 1 Plaintiff Tracey Catherine Briggs appeals from the trial court's order granting Defendant Sara Marie Markiewicz's motion for summary judgment. After careful review, we affirm.

Background

¶ 2 On the morning of 23 August 2016, Defendant was driving east in the right

lane of a four-lane stretch of N.C. Highway 280 near Brevard. Plaintiff was driving in the left lane, also heading east, "slightly ahead of" Defendant's car. At the same time, John Jennings Campbell, II, was driving west on the same stretch of Highway 280, being pursued by Trooper William E. Hemphill. Campbell was driving directly behind another westbound car, driven by Kristl Carpenter, when he crossed the center line into the left eastbound lane and passed Carpenter.

¶ 3 Campbell was driving west in the left eastbound lane at approximately 65 to 70 miles per hour when his vehicle struck Plaintiff's head-on. Plaintiff's car spun into the right eastbound lane, where it struck Defendant's car. Defendant's car then veered up an embankment off the right side of Highway 280; when it slid back onto the road, it was struck by a fourth vehicle.

¶ 4 On 31 July 2019, Plaintiff filed suit against Campbell and Defendant, alleging reckless and negligent driving by Campbell and negligent driving by Defendant. Defendant subsequently moved to dismiss the complaint,[1] but before the motion came on for hearing, the parties filed a stipulation in which they consented to Plaintiff filing and serving an amended complaint. On 14 February 2020, Plaintiff filed an amended complaint. On 2 March 2020, Defendant filed her answer, in which she moved to dismiss the complaint for failure to state a claim and raised affirmative

[1] This motion to dismiss does not appear in the record on appeal.

defenses, including contributory negligence and sudden emergency, and generally denied the allegations of Plaintiff's complaint. On 22 January 2021, Plaintiff voluntarily dismissed her claims against Campbell pursuant to a settlement agreement.

¶ 5 On 22 February 2021, Defendant filed her motion for summary judgment. Thereafter, on 16 March 2021, Defendant filed an amended motion for summary judgment, along with supporting affidavits from Defendant, Trooper Hemphill, and Carpenter. On 25 March 2021, Plaintiff's counsel submitted an affidavit opposing Defendant's motion for summary judgment, together with several exhibits and a supplemental affidavit from Trooper Hemphill. Plaintiff also filed her objection to the affidavits submitted by Defendant and a memorandum opposing Defendant's motion for summary judgment.

¶ 6 On 29 March 2021, Defendant's motion for summary judgment came on for hearing, and on 9 April 2021, the trial court entered an order granting Defendant's motion for summary judgment and dismissing Plaintiff's complaint with prejudice. Plaintiff timely filed notice of appeal.

Discussion

¶ 7 On appeal, Plaintiff argues that the trial court erred by granting Defendant's motion for summary judgment. We disagree.

A. Standard of Review

¶ 8 In considering a motion for summary judgment, the determinative issue is whether "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Honeycutt v. Honeycutt*, 208 N.C. App. 70, 77, 701 S.E.2d 689, 694 (2010) (citation omitted); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "A genuine issue of material fact is one that can be maintained by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Curlee v. Johnson*, 377 N.C. 97, 2021-NCSC-32, ¶ 11 (citations and internal quotation marks omitted).

¶ 9 "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima facie* case at trial." *Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist.*, 257 N.C. App. 542, 550, 811 S.E.2d 198, 204 (2018) (citation omitted). "[T]he non-moving party must forecast sufficient

evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Id.* (citation omitted).

¶ 10 The "standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact." *Fulmore v. Howell*, 227 N.C. App. 31, 33, 741 S.E.2d 494, 496 (citation omitted), *disc. review denied*, 367 N.C. 246, 748 S.E.2d 545 (2013). However, "if a grant of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *RME Mgmt., LLC v. Chapel H.O.M. Assocs., LLC*, 251 N.C. App. 562, 567, 795 S.E.2d 641, 645 (citation and internal quotation marks omitted), *disc. review denied*, 370 N.C. 213, 804 S.E.2d 546 (2017).

B. Analysis

¶ 11 Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendant because Plaintiff presented sufficient evidence from which a reasonable jury could have concluded that Defendant "breached her duty to keep a proper lookout, causing the collision" between Plaintiff and Defendant. We disagree.

¶ 12 "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267, *reh'g denied*, 360

N.C. 546, 635 S.E.2d 58 (2006). In the instant case, Plaintiff invokes the well-established "general duty required of all motorists to keep a reasonable and proper lookout in the direction of travel and see what they ought to see." *Cucina v. City of Jacksonville*, 138 N.C. App. 99, 103, 530 S.E.2d 353, 355 (citation and internal quotation marks omitted), *disc. review denied*, 352 N.C. 588, 544 S.E.2d 778 (2000). Drivers "owe [this] duty to all other persons using the highway[.]" *Privett v. Yarborough*, 166 N.C. App. 664, 667, 603 S.E.2d 579, 581 (2004) (citation omitted).

¶ 13 As to breach, Plaintiff argues that the record, viewed in the light most favorable to her, "provides more than a scintilla of evidence from which the jury could find that [Defendant] breached her duty to keep a proper lookout," and that Defendant's breach of this general duty proximately caused the collision between Plaintiff and Defendant. However, Plaintiff has no personal recollection of the various collisions on 23 August 2016. Accordingly, Plaintiff relies on the affidavits of two witnesses to the accident and an interview statement of Defendant to support her argument.

¶ 14 Plaintiff first highlights Trooper Hemphill's averment that, immediately before he witnessed the series of collisions, he observed Campbell driving in the wrong direction on Highway 280, traveling at approximately 65 to 70 miles per hour for "[f]ive to ten seconds[.]" Plaintiff next emphasizes Carpenter's sworn statement that she saw Plaintiff and Defendant traveling in different lanes of Highway 280,

with Plaintiff's vehicle "slightly ahead of" Defendant's. Lastly, Plaintiff relies on a statement, which Plaintiff's counsel attached to her affidavit opposing Defendant's motion for summary judgment, that Defendant made in a recorded interview that she gave to her insurance provider. In the interview, Defendant provided her account of the events:

> [Defendant]: . . . I was driving along and we were waiting in line and I actually just felt a car hit me, so the lady next to me and (inaudible) ran into me, so I tried to brake and swerve. My car went right into the curb and it hit the embankment and it rolled over.
>
> Q: Okay, so, you don't know why she hit you or anything? You didn't see anything, you just felt her hit you?
>
> [Defendant]: Correct. At the time I did not see anything or know why she hit me.

¶ 15 From these statements, Plaintiff argues that a jury could have inferred that Defendant "should have seen the Campbell vehicle speeding down the hill in the wrong lane of travel and appreciated the possibility of a head-on collision between Campbell and [Plaintiff]." Plaintiff contends that had Defendant "maintained a proper lookout, [Defendant] could have slowed or taken other actions to avoid the ensuing collision." Plaintiff acknowledges that Defendant "could not have done anything to prevent Campbell from colliding with" Plaintiff's vehicle; nevertheless, she contends that Defendant "could have slowed or swerved to avoid [Plaintiff's] second head-on collision had she kept a proper lookout."

¶ 16 Yet even taking the record "in a light most favorable to" Plaintiff, as we must, *Fulmore*, 227 N.C. App. at 33, 741 S.E.2d at 496 (citation omitted), we cannot agree that Plaintiff's inferences are sufficient either to forecast the evidence necessary to support her claim, or to surmount the affirmative defenses raised by Defendant as a bar to Plaintiff's claim, *see Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.

¶ 17 While it is well settled that Defendant owed a general duty of reasonable care to all drivers on the highway, it is equally settled that Defendant "was entitled to assume, even to the last moment, that [other drivers] would comply with the law before entering [her] lane of travel." *Daisy v. Yost*, 250 N.C. App. 530, 533, 794 S.E.2d 364, 367 (2016) (citation and internal quotation marks omitted); *see also Penland v. Greene*, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976) ("Ordinarily a person has no duty to anticipate negligence on the part of others. In the absence of anything which gives or should give notice to the contrary, [s]he has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law."). Accordingly, Defendant had no duty to anticipate that either Plaintiff or Campbell would act in a negligent manner.

¶ 18 Plaintiff alleges that Defendant's negligent failure to see or anticipatorily react to Campbell driving the wrong direction in the lane of oncoming traffic for as much as "[f]ive to ten seconds," as Trooper Hemphill recalled, was a breach of her duty to keep a proper lookout and caused the second collision. However, even viewing the

record in the light most favorable to Plaintiff, *Fulmore*, 227 N.C. App. at 33, 741 S.E.2d at 496, there is no inference of negligence that can reasonably attach to Defendant's conduct that would not also attach to Plaintiff's with equal, if not greater, force. Plaintiff has no recollection of the accident; hence, she cannot and does not offer any factual basis to explain why the same inferences that support Defendant's alleged negligence would not, by the same logic, also implicate her own negligence. Plaintiff's claim is thus vulnerable to Defendant's asserted affirmative defense of contributory negligence.[2]

¶ 19 Moreover, Plaintiff's evidence cannot overcome Defendant's asserted affirmative defense of sudden emergency. "The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Id.* (citation omitted).

> The sudden emergency doctrine provides that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable [person] might act in such an emergency. Two elements must be satisfied before the sudden emergency doctrine applies: (1) an emergency situation must exist requiring immediate action to avoid injury, and (2) the emergency must not have been created by the negligence of the party seeking the

[2] "Contributory negligence is defined as negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Daisy*, 250 N.C. App. at 532, 794 S.E.2d at 366 (citation and internal quotation marks omitted).

protection of the doctrine.

Id. (citation omitted).

¶ 20 In the present case, the collision between Campbell and Plaintiff presented Defendant with just such an "emergency situation . . . requiring immediate action to avoid injury" that was not created by any negligence on the part of Defendant. *Id.* (citation omitted). It is undisputed that Plaintiff's car collided with Defendant's immediately after being struck by Campbell's vehicle. Trooper Hemphill averred that Plaintiff's car was pushed "backwards into the right[-]hand lane and into the path of travel of [Defendant's car]. As the collision had occurred so quick and sudden [Defendant] was unable to avoid being struck by" Plaintiff's car. Our careful review of the record shows no evidence to refute that the second collision occurred immediately after the first, leaving Defendant with very little time to reflect on the best course of action.

¶ 21 We cannot accept Plaintiff's argument that Defendant negligently created the sudden emergency by failing to keep a proper lookout. As stated above, Defendant had "no duty to anticipate negligence on the part of others." *Penland*, 289 N.C. at 283, 221 S.E.2d at 368. And under the circumstances presented, no reasonable inference of Defendant's negligence can exist without implicating Plaintiff's own contributory negligence in equal measure. We thus conclude that the sudden-emergency doctrine applies in this case.

¶ 22 "One who is required to act in emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Winfield v. Smith*, 230 N.C. 392, 400, 53 S.E.2d 251, 255 (1949) (citation omitted). As stated above, Plaintiff recites a litany of hypothetical actions that Defendant might have taken that could have lessened the impact of the second collision. For example, Plaintiff argues that Defendant "should have seen the Campbell vehicle speeding down the hill in the wrong lane of travel and appreciated the possibility of a head-on collision between Campbell and [Plaintiff]"; according to Plaintiff, had Defendant "maintained a proper lookout, she could have slowed or taken other actions to avoid the ensuing collision." However, absent actual supporting evidence for these allegations, in a sudden emergency, Defendant's actions are not reviewed with such speculative and unforgiving hindsight.

¶ 23 Plaintiff has not shown that Defendant failed to make "such choice as a person of ordinary care and prudence, similarly situated, would have made" in the sudden emergency that befell her. *Id.* (citation omitted). Facing Defendant's motion for summary judgment, Plaintiff, as the non-movant, was required to produce a forecast of evidence demonstrating the existence of a genuine issue of material fact in order to withstand summary judgment. *See Badin Shores*, 257 N.C. App. at 550, 811 S.E.2d at 204. The record contains no evidence that Defendant acted negligently, causing

injury to Plaintiff. Accordingly, we must conclude that the trial court did not err by granting summary judgment in favor of Defendant.

Conclusion

¶ 24 For the foregoing reasons, Plaintiff has not shown that the trial court erred by granting Defendant's motion for summary judgment. The trial court's order is affirmed.

AFFIRMED.

Judges INMAN and GORE concur.

Report per Rule 30(e).